Supreme Court of the United States

March Term, 1945

MURRAY COHEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

Jurisdiction

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended.

Opinions of the Court Below

The *Per Curiam* opinion of the Circuit Court of Appeals is attached to the record hereof and certified by the Clerk of the Circuit Court to this Court.

No opinion was rendered in the District Court.

Statement of the Case

In order to intelligently present the question of law and procedural practice involved herein, it is necessary to state briefly the facts which led to this problem.

The indictment charged the defendant Cohen and one Leonard with the crime of conspiracy to violate the pro-

visions of the Selective Service and Training Act, Sec. 311 U. S. C. A.

The overt act charged in the indictment was "the making of a false statement as to the physical unfitness of defendant Cohen for service under said act".

The Government proved that the false statement (namely the alteration of the physical record) was made by Leonard (co-conspirator).

The only testimony as to the conspiracy itself came from the lips of Leonard, the co-conspirator who, having pleaded guilty herein testified on behalf of the Government.

Cohen took the stand in his own defense and denied that he ever conspired with Leonard or any other person to falsify his physical record. He denied that he knew what Leonard was going to do or had done with his record. He stated that he first learned or heard he was 4F for "hernia" when questioned by the agents of the Federal Bureau of Investigation on December 6, 1943. (The falsification of the physical record by Leonard was done on May 20, 1943, some seven months previous.)

Leonard on his direct examination had testified that Cohen in December, 1943 had asked him (Leonard) to get the list of persons from the Draft Board who had been granted a 4F classification on account of hay fever and/or sinus trouble. Leonard stated that he told Cohen he would get such list, but in fact, never did. This testimony of the Government's only witness regarding the conspiracy weakened the Government's case perceptibly. Cohen had claimed through his doctors as shown by Exhibit "A" on file with his Draft Board that he was suffering from hay fever and sinus and had been operated on and hospitalized

for such ailments. Leonard's testimony therefore to the effect that Cohen in December, 1943 was asking for the list of hay fever and sinus rejects weakened the Government's contention that Cohen was a party to a conspiracy in May of 1943 to make a false statement regarding his physical condition, namely to represent him as having a hernia which in fact, he did not have. In fact, Leonard had kept from Cohen all knowledge of his (Leonard's) act in falsifying and altering the physical record. Cohen's statement, therefore, that it was only when questioned by the members of the Federal Bureau of Investigation on December 6, 1943 that he learned he had been classified 4F for a hernia was vital evidence upon the trial. The Government realizing that Leonard's testimony had weakened its position with regard to the conspiracy called in rebuttal the agents of the Federal Bureau of Investigation in an effort to cure such deficiencies created by Leonard's testimony.

As shown by the summary statement hereinabove the two members of the Federal Bureau of Investigation proceeded to testify as refreshed by notes in writing made by them as of the time of their conversation with defendant Cohen on December 6, 1943. They both admitted having read said notes immediately before taking the witness stand. They both contradicted Cohen's previous testimony that they had questioned him concerning whether he suffered from hernia then or at any time. Both these witnesses denied that they had told Cohen he had been granted a 4F classification on account of hernia. They likewise denied that Cohen stated he believed he had been granted the 4F classification on account of hay fever or sinus or both.

Having testified in direct contradiction to Cohen's testimony as to what was said upon the examination by these agents on December 6, 1943, and it definitely appearing that the agent's testimony was a mere recital of their own written notes, counsel for the defendant Cohen sought an inspection of the witnesses' written notes for the purpose of testing their credibility. Objection was interposed by the District Attorney to the production for inspection and use of the said notes and the objection was sustained by the Trial Court. The written notes, therefore, were never produced for inspection either by defense counsel or by the Trial Court.

Specification of Errors

One: The Circuit Court erred in holding that there was no error committed by the Trial Court in denying the inspection and use of the written notes for the purpose of testing the credibility of the witness.

Two: The Circuit Court of Appeals in examining upon the appeal to that Court, the said written notes, committed error in considering evidence that did not form part of the record on appeal herein.

Argument

I. The practice of permitting inspection and use of written statements to contradict the testimony of a witness in a criminal cause has never, as far as we can find, been ruled on in this Court.

> (See opinions both prevailing and dissenting in *U. S.* v. *Krulewitch*, 145 Fed. 2nd 76.)

> The New York State law definitely permits inspection and use upon cross-examination of statements so made, wherein it is the established practice first to permit an inspection of such statements by the Trial Court, and if, in the opinion of the Court, contradictory matter is reflected in such statements, to permit the use thereof on cross-examination of the witness who made the same.
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> *People* v. *Walsh*, 262 N. Y. 140, 149, 150;
> *People* v. *Schainuck*, 286 N. Y. 161, 165, 166.

Since the decision in the *Krulewitch* case, *supra*, other Federal decisions dealing with this question show uncertainty and conflict in opinions.

U. S. v. *Ebeling*, 146 Fed. (2nd) 254.

The decision in the *Krulewitch* case, *supra*, marked a trend in the Federal Court to follow the New York State Rule.

U. S. v. *Joseph Cohen*, 145 Fed. (2nd) 82.

In the above case the opinion of the Circuit Court of Appeals, Second Circuit, states at page 92:

> "We have very recently considered this question in United States v. Krulewitch, 145 F. (2d) 76, and we need not repeat what we there said. We held that when statements are taken by the prosecution which appear upon inspection by the judge to contradict the testimony of the witness when he is called at the trial, the accused should be allowed to inspect them, since he cannot otherwise impeach the witness."

In the instant case the written notes were not produced at the trial even for inspection by the Court, said notes

were, therefore, not part of the record on appeal to the Circuit Court. The rule of practice established by the *Krulewitch* case and recognized in the *Cohen* case, *supra*, was not followed by the Trial Court in the instant case. The Trial Court not having inspected the notes, and defense counsel having been denied inspection, the question as to whether the said notes contained contradictory matter could not be determined upon the trial. Such denial of inspection was prejudicial error.

In the *Ebeling* and *Joseph Cohen* cases, *supra*, the Trial Court first inspected the written statements and both statements were made a part of the record on appeal. In the instant case the Trial Court did not inspect said written notes and the notes are not a part of the record. The error committed by the Circuit Court in examining evidence not in the record in this case is hereinafter treated in this brief.

It must be remembered in the instant case that the testimony of the two Government witnesses was in fact a recital of what they said was contained in their written notes made at the time of the interrogation of the defendant Cohen. They both admitted refreshing their memories by reading their said notes immediately before taking the witness stand. Under such admitted circumstances their testimony was in effect a statement taken from the defendant Cohen which they refused to produce.

The issue as to Cohen's knowledge of the alteration of his physical record was most important in this case. The Government realized such fact by calling the members of the Federal Bureau of Investigation to negative Cohen's statement that he first learned about a hernia when ques-

tioned by these agents on December 6, 1943, some seven months after the alteration of the record by Leonard. Leonard's testimony regarding his December, 1943 conversation with Cohen concerning the lists of hay-fever rejects had forcibly displayed that Cohen did not know about a hernia falsification in his record even at that time. The issue created thereby was a highly sharp one, and the production of the notes would have undoubtedly tended to release evidence important in ascertaining the truth.

If the notes had been produced at the trial and contained matter contradicting the sworn testimony of these witnesses, it would undoubtedly have had a most important bearing on the result in this case.

II. The Circuit Court of Appeals committed error in examining upon the appeal to that Court the said written notes which were not part of the record. The error of the Trial Court in refusing defense counsel's request for inspection and use of the notes was not cured by the examination by the Circuit Court of the notes purported to have been made by these witnesses. As indicated by the *Per Curiam* Opinion of the Circuit Court herein, the District Attorney, upon the argument of the appeal in that Court, handed up papers purporting to be the written notes in question. The action of the District Attorney was an apparent effort to cure in the Appellate Court what should have been done in the Trial Court.

It is fundamental that Appellate Courts can only consider what is contained in the record on appeal and nothing more.

Edwards v. *U. S.*, 312 U. S. 473.

This Court in the above case stated at pages 481 and 482:

> "Finally the Government contends that the refusal to order the production of the testimony was not prejudicial. This argument presupposes that the offer to produce in the trial court and the actual production in the Circuit Court of Appeals was adequate. Otherwise we cannot know what the testimony was which is relied upon for the amnesty. We think that neither offer was an adequate proffer. In neither instance was the petitioner given an opportunity to cross-examine; no witness produced the transcript; it was not certified as a part of the record from the trial court or as a part of the records of the agency. The record certified to the Circuit Court of Appeals is the record on which the appeal is to be heard. Criminal Appeals Rules VIII and IX."

CONCLUSION

It is respectfully submitted that because of the foregoing reasons the fundamental questions involved in this application are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a Writ of Certiorari.

Respectfully submitted,

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Of Counsel,

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